



Attorney General  
STATE CAPITOL  
Phoenix, Arizona 85007

Robert E. Corbin

September 6, 1979

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**ARIZONA ATTORNEY GENERAL**

Mr. Walter C. Madsen  
Arizona State Banking Department  
Room 101 Commerce Building  
1601 West Jefferson  
Phoenix, AZ 85007

Re: I79- 231 (R79-183)

Dear Mr. Madsen:

This is in response to your letter of June 14, 1979, in which you asked the following question:

Do the provisions of A.R.S. § 6-834.D prohibit a licensed escrow agent from receiving accounting and other escrow related services at no charge from a bank in return for the deposit of all their escrow funds in noninterest-bearing accounts with that bank?

The practice at issue is essentially a trading of escrow services for deposits. The escrow agent takes escrow account balances and deposits them in noninterest-bearing demand deposit accounts. In return for these deposits, the bank provides computerized analysis of the escrow balances, including accounting, record-keeping, and other similar services. The bank's computerized escrow service has a market value and is currently available to an escrow agent for a fee.<sup>1/</sup> Thus, when the escrow agent agrees to deposit escrow funds with a bank in return for free computerized escrow services, he is receiving something of value, which is the waiver of the usual fee for these services.

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<sup>1/</sup> The escrow agent is required by law to provide accounting and record keeping services pursuant to A.R.S. § 6-831.

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A.R.S. § 6-834.D provides:

D. Any interest received on funds deposited with an escrow agent in connection with any escrow which are deposited in an authorized depository shall be paid over to the depositing party to the escrow and shall not be transferred to the account of the escrow agent. Nothing in this section shall be deemed to limit or restrain the right of the depositing party to contract with respect to the interest received on such deposits by an independent and subsequent agreement.

This provision prohibits an escrow agent from personally benefitting from the deposit of his escrow customer's money.<sup>2/</sup> Although the practice of trading escrow services for noninterest-bearing bank accounts is not expressly prohibited, in our opinion this practice would violate the purpose and meaning of the statute.

The purpose of A.R.S. § 6-834 is to have all benefits and value derived from the escrow funds flow to the depositing party and not to the escrow agent. The agent's receipt of accounting and other escrow services from the depository bank is nothing more than a substitute for the payment of interest which the bank would otherwise pay on the deposited funds. For this reason we view the receipt of services in exchange for compensating balances as prohibited under A.R.S. § 6-834.D.<sup>3/</sup>

Sincerely,



BOB CORBIN  
Attorney General

BC/mm

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<sup>2/</sup> A.R.S. § 6-834.A specifies that escrow account monies must be clearly designated as such, "indicating that the funds are not the funds of the escrow agent." The independent nature of escrow funds is reinforced by subsection C, which provides "escrow funds are not subject to execution or attachment on any claim against the escrow agent."

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Footnote Continued

3/ We note that Arizona courts have consistently held that an escrow agent is a trustee and a fiduciary. See, e.g., Tucson Title Ins. Co. v. D'Ascoli, 94 Ariz. 230, 383 P.2d 119 (1963); Malta v. Phoenix Title & Trust Co., 76 Ariz. 116, 259 P.2d 554 (1953). As a trustee, he is under a duty to the beneficiary to administer the trust solely in the interest of the beneficiary. Fulton Nat'l Bank v. Tate, 363 F.2d 562 (5th Cir. 1966).